Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77–54

JOSEPH D. BEASLEY, M.D.,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

LEONARD B. BOUDIN
30 East 42nd Street
New York, New York 10017

ARTHUR A. LEMANN, III
P.O. Box 49
New Orleans, Louisiana 70118

Attorneys for Petitioner

On the Brief
HERBERT JORDAN
Rabinowitz Boudin & Standard
New York, N.Y. 10017

October 31, 1977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-54

JOSEPH D. BEASLEY, M.D.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

The purpose of this reply is to call the Court's attention to a disturbingly large number of misstatements of material fact in the Solicitor General's brief. We are deeply concerned by the misstatements, both because they lessen Dr. Beasley's chances for fair consideration of his petition, and because we fear that they evince a relaxation of the Solicitor General's solemn responsibility to state cases accurately and fairly -- particularly on petitions for certiorari where no record is provided to the Court for independent re-

view.[1]

1. The first significant misstatement is that petitioner's "claims of error . . . are identical to the contentions presented by co-defendant Kramer in No. 77-5040," whose petition for certiorari was denied on October 3, 1977. Br.,4.[2] One of the petitioner's principal contentions is not even mentioned in Kramer's petition, namely that due process required the government either to grant immunity to Copelin and Hubbard or to accept dismissal of the indictment. Beasley Pet., pp. 22-23.[3]

---

1 / In times past the Solicitor General has discharged this responsibility admirably, sometimes even calling to the Court's attention matters which are unknown and favorable to the opposing party. See, e.g., Black v. United States, 385 U.S. 26.

2 / Earlier, at pp. 3-4, the Solicitor General purportedly states what the "evidence at trial showed," p. 3. It is obvious from the petition that in reality the statement is of the government's theory of what the evidence showed, many parts of which were contradicted by the defense.

3 / Kramer has filed a petition for rehearing which, we are informed, is on the calendar for the Court's conference on November 11, 1977.

2. In opposing petitioner's contention that he is entitled to relief because of an undisclosed deal with Ronnie Moore (Br., 4-5), the Solicitor General relies entirely upon an argument supporting the lower courts' "fact-finding" that "there was no secret 'deal' between Moore and the government." Br., 5. [4] This emphasis upon facts presumably heightens the Solicitor General's duty to be attentive to the facts and to state them fully and accurately, and certainly heightens our dismay at his failure to do so.

The brief states:

> "Prior to trial, however, petitioner received copies of Moore's grand jury testimony and was thus made aware both that Moore had recanted and of the reasons for the recantation. Moreover, Moore expressly testified on cross-examination at petitioner's trial that, after his attorney had spoken to the government prosecutor, he decided to change his testimony to avoid a perjury prosecution."

Br., 4-5.

---

4 / The Solicitor General does not deny that, if there were such a secret deal, petitioner would be entitled to a new trial under Giglio v. United States, 405 U.S.150 and Napue v. Illinois, 360 U.S. 264.

This statement is extremely misleading.

First, while it is true that petitioner received a copy of Moore's grand jury testimony prior to trial, and while it is also true that the transcript showed that Moore had recanted, it is not true that the transcript accurately indicated "the reasons for the recantation," namely to keep a bargain with the prosecutors. On the contrary the testimony misleadingly indicates a purely voluntary recantation by Moore on his own initiative, without any promises, pressure or statements of any kind from the prosecutors.

Second, while it is true that Moore testified on cross examination at trial that "he decided to change his testimony to avoid a perjury prosecution," Br., 5, supra, it is not true that he "expressly testified" that "his attorney had spoken to the government prosecutor" at any time prior to that decision, id., or that there had been communication of any kind between Moore and the prosecutor prior to the decision. 5/

5/ The testimony expressly indicates only that Moore's counsel contacted the prosecutors prior to Moore's actual appearance before the grand jury, Tr. Mar. 14, 1975, p. 204. Likewise, Moore told the grand jury that his counsel, at Moore's request, contacted the prosecutors "and requested that [Moore] appear before this grand jury" and tell "the entire story." G.J. Tr.p.4.

In short, instead of facing up to the facts and making appropriate legal arguments, the Solicitor General's brief attempts to obscure what the post-trial record unambiguously shows, namely that there was a deal between the prosecutor and Moore, a deal which was sought and initiated by the prosecutor, a deal which was kept secret from petitioner and the jury until after trial.

3. In opposing petitioner's contention that a new trial is required under Brady v. Maryland, 373 U.S. 83, the Solicitor General states that the undisclosed statements of Copelin and Hubbard "were inconsistent to some extent with those of Moore and Wallace." Br., 5. The accuracy of this characterization is of substantial legal importance, because the significance of the "inconsistencies" determines whether the undisclosed evidence is "material" in the constitutional sense. 6/

The Solicitor General's characterization contrasts sharply with the sworn statement of petitioner's prosecutor:

> ". . . both Mr. Copelin and Mr. Hubbard denied Mr. Wallace's story. At some points they agreed, but for the critical points they disagreed . . . . They denied the basic Wallace story. Both of them denied it." State Tr., p. 193.

6/ United States v. Agurs, 427 U.S. 97, 108-113.

In further opposition to petitioner's Brady argument the Solicitor General suggests that petitioner knew what Copelin's testimony would be prior to trial. Br., 6, n. 3. He states as fact that petitioner's attorney "was informed by Copelin's attorney of what Copelin's testimony would be and agreed that it would be harmful to petitioner (St. Tr.638-639)." Id. The only possibly relevant testimony on pages 638 or 639 of the State Transcript is that of a member of the defense team to the effect that prior to trial the defense knew that Copelin had given information to the government and that "the information [he] understood Mr. Copelin had given the government was incriminating . . . ." St. Tr., 639 ll.4-6. This testimony, and the Solicitor General's characterization of it, obscure the crucial fact that the defense did not learn until after trial that in reality the information which Copelin gave the prosecutors was exculpatory in that it refuted the testimony of Wallace on "the critical points." St. Tr., 193, quoted more fully above. 7/

7/ The grand jury testimony of Copelin, Br. 6 n. 3, did not relate to the subject of petitioner's trial. The "handwritten notes of the prosecutor's interview with Copelin," id., do not, so far as we can discern, either inculpate or exculpate petitioner. However, the Solicitor General neglects to mention that the notes pertain only to the first of three or four such

[fn. cont'd. on next page]

We conclude this reply, as we began our argument in the petition, by emphasizing that this case presents important questions concerning the principle that "the attorney for the sovereign . . . must always be faithful to his client's overriding interest that 'justice shall be done.'" United States v. Agurs, supra, 427 U.S. 110-11. The sovereign's loftiest advocate should not lose sight of this principle when defending the work of subordinate government attorneys. He has apparently done so here. The Court should therefore grant the writ in order to resolve the issues presented on the basis of an independent review of the record.

Respectfully submitted,

Leonard B. Boudin
Arthur A. Lemann, III

Attorneys for Petitioner

October 31, 1977

[fn. 7 continued]

interviews, and petitioner received no copies or summaries as to the others.